***EXHIBIT 10***

ACLU
AMERICAN CIVIL LIBERTIES UNION of NEVADA

To: Board of Prison Commissioners
From: Lee Rowland, ACLU of Nevada
Re: **ACLUNV Constitutional Concerns re: NDOC Administrative Regulation 810 (re: religious observance)**
Date: April 3, 2009

Dear Members of the Board of Prison Commissioners,

AMERICAN CIVIL LIBERTIES UNION OF NEVADA
1325 AIRMOTIVE WAY
SUITE 202
RENO, NV 89502
775.786.1033
www.aclunv.org



At the July, 2008 meeting of the Board of Prison Commissioners, the ACLU of Nevada submitted written testimony supporting the amended language in Administrative Regulation 810, but noting that "the devil will be in the details of its application." Sadly, we have been alerted to language in the NDOC Religious Practice Manual, implementing AR801, which we believe violates constitutional standards for the recognition of one's right to freedom of religion.

The Manual currently requires that in order to participate in the sweat lodge ceremony, an inmate must be a recognized Native American, and must present proof of his heritage. **We firmly believe both requirements violate the U.S. Constitution, and urge the BPD to *immediately* alter this rule to avoid litigation by an inmate who has a sincere belief in Native practices but is denied based on lack of proof of Native heritage**. From the Manual at 8(D):

> *"D. Consistent with Operational Procedures and Classification, Bureau of Indian Affairs and Code of Federal Regulations inmates eligible to participate in Sweat Lodge Ceremony includes:*
>
> *a. Inmates who are enrolled in a federally recognized tribe; or*
>
> *b. Inmates who can demonstrate credible association with tribal living via written documentation from a recognized tribe."*

Several courts have looked into the issue of whether Native American religious rites may be restricted based on one's heritage. To our knowledge, no court has ever found that such ethnicity-based religious rights are constitutionally permissible. As one Court eloquently explained *Combs v. Corrections Corp. of America*, 977 F.Supp. 799, 802-803 (W.D.La. 1997):

> "In this case, we hold that the defendants have not demonstrated a reasonable relation to a legitimate penological interest in restricting the practice of the Native American Religion only to those prisoners of Native American ancestry. The WCC policy offends the fundamental constitutional right to practice religion of one's choice. The policy is akin

> to a requirement that practicing Catholics prove an Italian ancestry, or that Muslims trace their roots to Mohammed. Under the Constitution, the freedom to believe, or not to believe, in a religious faith is reserved not to a select class of citizens, but to all. The defendants are enjoined from restricting the practice of the Native American Religion to those who can demonstrate a BIA number or Native American ancestry....**In sum, the ethnicity test prescribed by WCC for religious practice does not pass constitutional muster.**"

*Id.* at 802-03 (emphasis added). Indeed, the federal Fourth Circuit Court of Appeals has looked at a strikingly similar rule propounded in the State of Virginia, which included both requirements that an inmate be Native American and be able to prove that status. The Court held that both requirements violated the Equal Protection clause in *Morrison v. Garraghty,* 239 F.3d 648, 652 (4th Cir. 2001).[1] The Court held that religious rights could not be determined "solely by [an inmate's] racial make-up or the lack of his tribal membership." *Id.* at 659.[2] The Court also explicitly found that the state's arguments that restricting this right to Native rituals to Native Americans was justified by safety reasons:

> "However, given defendants' failure to substantiate a claim that the sincerity of one's belief in Native American theology is determined by the color of his skin or the origin of his birth, and concomitant failure to articulate a rational connection between an inmate's race and his propensity to misuse the items requested, it is patently impermissible to control the number of dangerous items by instituting a policy which arbitrarily makes race or heritage the threshold requirement for according an individual inmate the privilege of obtaining them."

*Id.* at 661.[3]

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[1] The Court explained at length that the scrutiny employed under the Equal Protection clause was low, and tempered by extreme deference to prison safety considerations. 239 F.3d at 655. Notably, the case arose prior to the passage of the Religious Land Use and Institutionalized Persons Act of 2000, [RLUIPA], a federal law requiring a higher standard of scrutiny for religious observance by prisoners in facilities receiving federal money.

[2] In addition, a line of Ninth Circuit cases make plain that whether or not someone is "enrolled in a federally recognized tribe" is not the test for Indian status under the law. *See, i.e., U.S. v. Bruce,* 394 F.3d 1215, 1225 (9th Cir. 2005); and cases cited therein.

[3] *See also Brown ex rel. Indigenous Inmates at N.D. State Prison v. Schuetzle,* 368 F.Supp.2d 1009, 1024 (D.N.D. 2005) ("Following *Combs,* the Court expressly finds that NDSP officials would be prohibited under the First Amendment from adopting a policy that prevented non-Native Americans from attending the sweat lodge ceremony. Such a policy would not withstand constitutional muster and would offend the fundamental constitutional right to practice religion of one's choice whether Native American or non-

**In sum, we believe that existing federal case law, RLUIPA, the First Amendment, and the Equal Protection clause all suggest that the current rules are impermissible. We urge the Board to take immediate action to change these laws in order to avoid needless litigation.**

Sincerely,

Lee Rowland
Staff Attorney
Northern Coordinator
ACLU of Nevada

cc: Janet Traut, Deputy Attorney General
Nevada Indian Commission
NDOC Director Howard Skolnik
Amy Fettig, ACLU National Prison Project

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Native American."); *Martinez v. Ortiz*, Not Reported in F.Supp.2d, 2006 WL 771326 at *4 (D.Colo.,2006) (Refusing to grant Native American inmate's petition to restrict sweat ceremonies to Native Americans because "Defendants must consider all inmates' freedom of religion rights in developing prison policies. If I were to grant Plaintiff's motion for a preliminary injunction, both non-natives' and other Native Americans' freedom of religion rights may be infringed upon in violation of their First Amendment rights."); *Mitchell v. Angelone*, 82 F.Supp.2d 485, 492 (E.D.Va.1999) ("Defendants' refusal to acknowledge that sincere belief in Native American theology is not absolutely limited to individuals with a certain percentage of Native American blood defies common sense and precedent"); *Skenandore v. Endicott*, Slip Copy, 2006 WL 2587545 at *22 n.7 (E.D.Wis. 2006) (permitting non-Native participants in sweat lodge did not violate rights of Native inmates).